

## REMARKS

The Office Communication (Advisory Action) of September 15, 2005 revealed that the Examiner felt the need to consider the Applicants' recent disclosure of prior use. The Van Zee (5,129,208) and Meyer (4,910,949) patents were already of record as prior art in this application well before the letter of disclosure was sent, and no other prior art was disclosed except to note that certain structures of both patents were present in prior art balers. Hence, Applicants do not anticipate the Examiner's consideration of this prior art will result in a change in the matter of allowance of the instant application.

Claims 4–12 were rejected under 35 U.S.C. 102(b) as being anticipated by Myers et al. (U.S. Patent 6,006,504). This rejection is respectfully traversed.

In the Office Action, we read: "The baler comprises a front side defined by a roller (40)." (Page 2, section 3.) This limitation does not appear in claims 4–12. The word "front" is not used in these claims. A limitation: "a lower roller defines a bottom of the bale forming chamber" does appear in claim 4, however, the Office Action does not indicate how Myers et al. anticipated this limitation.

Regarding claims 4–5, Myers et al. do not disclose "a feed pan disposed under the belts said feed pan comprising: flexible net guides in a spaced relation to the lower roller that are supported underneath the flexible net guides by a closest cross-member to the lower roller, which closest lower cross member is spaced no closer than two (2) inches from the lower roller." According to the Office Action: "The arcuate wedge members (204) have an inherent amount of flexibility, and the members act as net guides (see 8, lines 29-31)." An insistence that the plates (202, 204) have inherent flexibility does not guarantee either: that these parts are flexible, **nor especially that the prior art has disclosed such**. Words are important to describing an invention in claims. At times, one must be able to distinguish between something flexible from something rigid. An insistence that everything is inherently flexible makes this impossible.

## CLAIM CONSTRUCTION

It is instructive to examine the decision in Phillips v. AWH Corp. et al., No. 03-1269, -1286 (July 12, 2005) (en banc).

The district court granted summary judgment of no infringement and no trade secret misappropriation. The original panel affirmed. En banc, the Federal Circuit affirmed the summary judgment of no trade secret misappropriation but reversed the summary judgment of no infringement. In doing so, the Federal Circuit set out the test for interpreting patent claims.

The principle issue presented before the en banc panel-which the Federal Circuit acknowledged was “hardly a new question,” was the extent to which the court should resort to and rely on a patent’s specification in seeking to ascertain the proper scope of its claims. The Federal Circuit reaffirmed the basic principles of claim construction set forth in *Markman* and *Vitronics*, but observed that its prior holdings with respect to the proper consideration of the use of dictionaries in claim construction “requires clarification”.

According to the Federal Circuit, the inquiry into how a person of ordinary skill in the art understands a claim term provides an objective baseline from which to begin claim interpretation. **Importantly, the person of ordinary skill in the art is deemed to read the claim term not only in the context of the particular claim in which the disputed term appears, but in the context of the entire patent, including the specification.**

The Federal Circuit found that the context in which a term is used in the asserted claim is highly instructive, and that other claims of the patent, both asserted and unasserted, could assist in interpretation. Further, the Federal Circuit recognized that it and the Supreme Court have long emphasized the importance of the specification in claim construction. **Therefore, the Federal Circuit held, it is entirely appropriate for a court, when conducting claim construction, to rely heavily on the written description for guidance as to the meaning of the claims.** The court also observed that, like the specification, the prosecution history provides evidence of how the PTO and the inventor understood the patent.

With respect to extrinsic evidence, the Federal Circuit found that dictionaries, treatises and expert testimony can be useful for claim construction. **But the Federal Circuit also noted that extrinsic evidence was unlikely to result in a reliable interpretation of patent claim scope unless considered in the context of the intrinsic evidence.**

After setting forth these basic principles, the Federal Circuit observed that, in some cases, it has given greater emphasis to dictionary definitions of claim terms and has assigned a less prominent role to the specification and the prosecution history-most notably, in the Texas Digital case from 2002. Under the methodology for claim construction suggested in Texas Digital, the specification should be consulted only after a determination is made, whether based on a dictionary, treatise, or other source, as to the ordinary meaning or meanings of the claim term in dispute. In other words, the specification was limited to being a “check” on the dictionary meaning of a claim term if the specification requires the court to conclude that fewer than all the dictionary definitions apply, or if the specification contains a sufficiently specific alternative definition or disavowal.

The Federal Circuit held that assigning such a limited role to the specification, and in particular requiring that any definition of claim language in the specification be express, is inconsistent with prior rulings that the specification is “the single best guide to the meaning of a disputed term,” and that the specification “acts as a dictionary when it expressly defines terms used in the claims or when it defines terms by implication.” The Federal Circuit noted that the main problem with elevating dictionaries to such prominence is that it focuses the inquiry on the abstract meaning of words rather than on the meaning of claim terms within the context of the patent. It observed that, by design, general dictionaries collect the definitions of a term as used not only in a particular art field, but in many different settings. Moreover, different dictionaries may contain somewhat different sets of definitions for the same words-and a claim should not rise or fall based upon the preferences of a particular dictionary editor, or the court’s independent decision, uninformed by the specification, to rely on one dictionary rather than another.

The Federal Circuit emphasized that it did not intend to preclude the appropriate use of dictionaries, and that the purpose underlying the Texas Digital line of cases-to avoid the danger of reading limitations from the specification into the claim-was sound. **The court held that, to avoid this danger, it was important to keep in mind that the purposes of the specification are to teach and enable those of skill in the art to make and use the invention and to provide a best mode for doing so. The Federal Circuit**

recognized that there was no magic formula or catechism for conducting claim construction, and that courts were not barred from considering any particular sources or required to analyze sources in any specific sequence, as long as those sources are not used to contradict claim meaning that is unambiguous in light of the extrinsic evidence.

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Therefore, for the purpose of claims 4–12, the definition of “flexible” is the ordinary and customary meaning according to persons skilled in the art. **One of ordinary skill in the art of agricultural machinery would recognize the purpose of the shape and structure (with beveled edges and flange) of the plates (202, 204) was to make them rigid. Such a one would not consider the plates (202, 204) to be flexible.**

The present rejection being under 35 U.S.C. 102(b), every limitation of the rejected claim must have been anticipated in the prior art. Certainly, **Meyers et al. did not disclose flexible net guides.** The disclosure in lines 29–31 in column 8 (Applicants assume column 8 was meant in the Office Action) of the Meyers et al. patent does not suggest flexibility of the plates (202, 204). **Myers et al. do not provide an enabling disclosure of a flexible net guide.** In fact, the provisions of beveled edges (216, 218) and a flange (226) over the lower front roll (40) result in rigid plates (202, 204).

Importantly, claim 4 cites: “...flexible net guides in a spaced relation to the lower roller that are supported underneath the flexible net guides by a closest cross-member to the lower roller...” **No net guides are disclosed in Myers et al. that are supported from below by a cross-member.** It is certain that the rollers (86, 88, 112) (referred to in the Office Action as “supporting cross members”) do not support the plates (202, 204) from below.

In the *Response to Arguments* section of the Office Action, we read: “The instant claims fail to distinguish “supporting cross members” over the cross member rollers of the Myers ’504 patent. While Applicant may certainly intend for the cross members to be something else, the claims do not require it, and “the name of the game is the claim.”” Certainly, applicants agree that the claims define the invention. However, the cross-member cited in claims 4 and 5 is configured to support the flexible net guides from

underneath. **The rollers (86, 88, 112) of the Myers et al. patent do not support the plates (202, 204) the Office Action defines as “flexible net guides” from any direction.**

Hence, Myers et al. did not anticipate all aspects of claims 4 and 5.

With regard to claim 6, again Myers et al. do not disclose flexible net guides, as clearly explained above. As well, no indication was given in the Office Action as to how Myers et al. anticipated the limitation “...a lower roller defines a bottom of the bale forming chamber,” but rather addresses “...a front side defined by a roller (40),” which is not cited in claim 6. Currently amended claim 6 includes the limitation, “wherein no cross member is nearer to the lower roller than one lower roller diameter.” **The only cross-member (178, see Fig. 2) disclosed by Myers et al. is adjacent to the lower roller referred to in the Final Office Action as being analogous to the lower roller of the instant invention.** Therefore, Myers et al. did not anticipate all aspects of claim 6.

Regarding claim 7, the same arguments used for claims 4–5 hold. Again, no indication was given in the Office Action as to how Myers et al. anticipated the limitation “...a lower roller defines a bottom of the bale forming chamber,” but rather addresses “...a front side defined by a roller (40),” which is not a limitation of claim 7. Claim 7 cites: “...flexible net guides in a spaced relation to the lower roller that are supported by a cross-member spaced a minimum horizontal distance from the lower roller equal to the diameter of the lower roller.” **Myers discloses a cross member (178, see Fig. 2) near roller (4) and less than “a minimum horizontal distance from the lower roller equal to the diameter of the lower roller.”** Therefore, Myers et al. did not anticipate all aspects of claim 7.

Regarding all of claims 5–7, the Office Action reads: “The supporting cross members (112, 86 and 88) for the netwrap mechanism are spaced more than 10 inches from the lower rollers (38 and 40).” **The Office Action ignored the only actual cross member (178) in the Myers et al. patent.** According to Fig. 2 in Myers et al., roller 40 is the lowest roller in the bale forming chamber. The only cross member (178) disclosed by Myers et al is in very close proximity to the lowest roller (40) – certainly closer than ten (10) inches (claim 5) and much less than “a minimum horizontal distance from the

lower roller equal to the diameter of the lower roller” (claims 6 and 7). Therefore, Myers et al. did not anticipate all limitations of claims 5–7.

In regard to claims 8–11, the Office Action states: “The net guide member (204) is located at a position generally above the pickup (see Figs. 1-2) and consists of horizontal and vertical plates.” However, clearly, **the plates (202, 204) of Myers et al. do not “direct crop material previously inserted into the bale formation chamber and the netwrap material away from the pickup” as cited in amended claim 8.** According to the Abstract of the Myers et al. patent: “These guide plates are shaped and positioned such that they perform the functions of creating a space between the bale end and the side wall for receiving marginal portions of the net, defining together with the side walls, a channel which leads from the net spreader rolls to the space created for receiving the net, rounding the end edges of the bale for better reception of the marginal portions of the net and deflecting crop material away from the spirals of the net spreader rolls so as to prevent them from wrapping with crop which would interfere with the feeding of the marginal portions of the net to be placed over the edges or corners at the opposite ends of the bale.” This is repeated in the Summary of the Invention section (col. 2 lines 2–14), and again in the Description of the Preferred Embodiment section: “The purpose of the plates 202 and 204 is four-fold. The first is to create a space at the edge of the bale for the introduction of the net, the second is to provide a channel through which the net material can travel so as to reach the space created at the edge of the bale, the third is to round the corners of the ends of the bale being wrapped so that the net more easily folds over it and the fourth is to deflect crop away from the spiral of the spreader rolls 186 and 188 so that the crop does not interfere with the feeding of the net.” (Col. 8 lines 27–31.) **None of these four purposes is to “direct crop material previously inserted into the bale formation chamber and the netwrap material away from the pickup” as cited in amended claim 8.** Therefore, Myers et al. did not disclose all limitations of claim 8.

Specifically regarding claim 9, the plates (202, 204) are vertically disposed on a vertical sidewall (22) as clearly seen in Fig. 4, and not “a generally horizontal rigid plate” as claimed. Therefore, Myers et al. did not disclose every limitation of claim 9.

Specifically regarding claim 11, which cites “the guide comprises a generally vertical flexible plate,” **Myers et al. do not disclose a flexible plate. No such enabling disclosure exists, enabling one of ordinary skill to make the plates (202, 204) of Myers et al. of a flexible material or flexible structure.** Therefore, Myers et al. did not disclose every limitation of claim 11.

With respect to claim 12, **Myers et al. do not disclose: “a brake for selectively applying a braking force to inhibit rotation of the roll of netwrap material,”** nor “a driver, including a cross-member, an activator and net spreader roller, that can be moved among three places including a first place wherein the activator rotates the net pan into the first pan position to release a net brake to thereby release tension in the netwrap material; a second place wherein the activator rotates the net pan to its second position and applies the net brake; and a third place where the activator rotates the net pan into its third position, and the cross-member traps the netwrap material against the net knife.” Therefore, Myers et al. clearly did not disclose every limitation of claim 12.

Claims 3, and 18-20 were rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent No. 6,006,504 to Myers et al. in view of U.S. Patent No. 6,550,218 to McClure et al. This rejection is respectfully traversed.

Claim 3 clearly recites that the drum roller of part (a) and the belt roller of part (b) defined the **inlet area** of the baler, not the baler itself. The Final Office Action states: “The *baler* comprises a front side defined by a roller (40)” (emphasis added) and: “The *baler* has a rear side defined by a belt roller (38) that has a length approximately equal to the length of the bale” (emphasis added). These misrepresent the limitations of claim 3. **Rollers 40 and 38 in the Myers et al. patent cannot define the front and rear of the inlet area of the baler,** respectively. The Office Action did not address the content and limitations of claim 3.

Claim 3 cites: “the *inlet area* comprising...a front side defined by a *drum* roller...” (emphasis added). The Office Action reads: “The *baler* comprises a front side defined by a roller (40).” (Emphasis added.) Roller 40 of the Myers et al. patent is a belt roller, not a drum roller. The floor roller (6) disclosed by McClure et al. does not define a front side

of the inlet area of the baler. Therefore, neither Myers et al. nor McClure et al. anticipated this claim limitation.

Further regarding claim 3, the Office action reads: “The baler has a rear side defined by a belt roller (38) that has a length approximately equal to the length of the bale.” In part (b) of claim 3, it is specified: “a rear side defined by a belt roller with a length approximately equal to the length of the cylindrical bale configured for indirect contact with the bale, *having belts between the drum roller and the bale;*” (emphasis added).

**The Office Action did not address the limitation that belts are specified between the rear belt roller and the bale.** In all of Figs. 1–3 of the Myers et al. patent, it is clear that **there is *no* belt in the region between roller 38 and the bale.** Therefore, neither Myers et al. nor McClure et al anticipated this claim limitation.

Also claimed in claim 3 is: “...the netwrap material contacts the formed bale in a void created by the wedges and *in front* of the belt roller” (emphasis added). In the Office Action, the orientation of the void to the belt roller is ignored in re: “The netwrap material (162) contacts the formed bale in a void created by the wedges (204).” From Fig. 3 in the instant invention, it is clear the void created by the arcuate wedge (204) is in front of the belt roller (46) and that belt roller (46) defines the rear of the inlet area. Because the roller (40) of Myers et al. alleged in the Office Action to be the “drum roller” is, in actuality, a belt roller (and not a drum roller), and because the voids created by plates (202, 204) are created *behind* the belt roller (40) (see Figs. 3 and 4), **Myers et al. did not disclose a void in front of the belt roller defining the rear of the inlet area.** Hence, Myers et al. did not anticipate all aspects of claim 3, nor did McClure et al. disclose the missing limitations.

Regarding claims 18–20, the Office Action alleges: “One of ordinary skill in the art would recognize that the simplest way to combine the drum roller of McClure with the Myers round baler would be to move the belt roller structure rearward – without changing the wrapping arrangement, in which the net wrap is fed over the belt roller.” **This is not borne out by evidence.** It is clear that McClure et al. arranged their nose belt roller (22) behind their floor roller (6) behind their pickup (5). **Yet it was not obvious to McClure et al. to dispose their netwrap material between the drum roller and the belt roller,**



as cited in claim 18. Note that **McClure et al. filed their patent *after* the Myers et al.** patent issued. Thus McClure et al. had opportunity to prove the alleged obviousness, but did not. Applicants respectfully request that the Examiner provide proof that the claimed combination is obvious, if the Examiner has such.

With respect to claim 19, neither Myers et al. nor McClure et al. disclosed “at least one netwrap material guide disposed between the netwrap roll and the belt roller, said netwrap material guide providing support for the netwrap material from below.” Hence, it would not have been obvious to one of ordinary skill in the art to have modified the invention of Myers et al. with the disclosure of McClure et al. to obtain the instant invention claimed in claim 19.

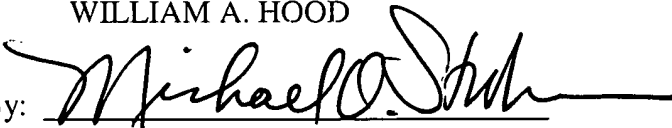
Regarding claim 20, neither Myers et al. nor McClure et al. disclosed “at least one cross member providing support for the at least one netwrap material guide from below.” Hence, it would not have been obvious to one of ordinary skill in the art to have modified the invention of Myers et al. with the disclosure of McClure et al. to obtain the instant invention claimed in claim 20.

Claims 22 and 23 are hereby added to more fully define the present invention.

Accordingly, because all claims 1–23 are believed to be clearly allowable, a notice to that effect is earnestly solicited.

Respectfully submitted,

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